Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Federal –State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements	)	CC Docket No. 98-171
	)	
Telecommunications Services for Individuals with Hearing and Speech Disabilities	)	CC Docket No. 90-571
	)	
Administration of the North American Numbering Plan	)	CC Docket No. 92-237
	)	
Number Resource Optimization	)	CC Docket No. 99-200
	)	
Telephone Number Portability	)	CC Docket No. 99-200
	)	
Truth-in-Billing and Billing Format	)	CC Docket No. 98-170

COMMENTS OF VOICESTREAM WIRELESS CORPORATION

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VoiceStream Wireless Corporation ("VoiceStream")[1] submits these comments in response to the Further Notice of Proposed Rulemaking ("FNPRM") issued in this proceeding.[2]

I. INTRODUCTION AND SUMMARY

The Commission asks whether it should change the way in which federal Universal Service Fund ("USF") contributions are assessed, moving from a percentage of interstate revenues to

[1] VoiceStream, combined with Powertel, Inc., is the sixth largest national wireless provider in the U.S., with licenses covering approximately 96 percent of the U.S. population and currently serving over seven million customers. VoiceStream and Powertel are wholly-owned subsidiaries of Deutsche Telekom, AG and are part of its T-Mobile wireless division. Both VoiceStream and Powertel are, however, operated together and are referred to in this document as "VoiceStream."

[2] *See Federal-State Joint Board on Universal Service,* Docket Nos. 96-45, 98-171, 90-571, 92-237, 99-200, 95-116, 98-170, *Further Notice of Proposed Rulemaking,* FCC 02-43 (Feb. 26, 2002), *summarized in* 67 Fed. Reg. 11268 (March 13, 2002)("*USF Contributions FNPRM*"). *See also Extension Order,* DA 02-783 (April 8, 2002).

a flat fee per network connection approach. VoiceStream has three primary concerns about the Commission's proposal. First, a connection-based assessment methodology is incompatible with the explicit requirements that Congress imposed in Section 254 of the Communications Act. Second, a connection-based assessment will not result in administrative efficiencies and savings. Finally, the Commission's proposal will result in customers contributing more to USF.

In VoiceStream's view, the real problem confronting the USF program is not the manner in which contributions are assessed, but the broad range of services supported by those contributions. Meaningful USF reform should focus not on USF contributions, but on the level of USF disbursements, and there should be a thoughtful reexamination of the panoply of services that have effectively become an expanding Universal Service entitlement. Unless USF subsidies are more carefully targeted, American consumers will pay more – *regardless* of whether carrier assessments are based on a percentage of interstate revenues or a fixed fee per network connection.

There is an ever-growing consumer issue that looms over wireless policymaking both at the federal and the state levels. Many of the Commission's and Public Utility Commission's ("PUC") new policies have direct and indirect customer cost implications. Particularly when there are direct pass throughs to the carriers' customers, the Commission and the PUCs should specifically consider new proposals from the perspective of customers.

The Commission proposes to increase the amount the average mobile customer pays for federal universal service from, on average, 46 cents to $1.00 monthly – an increase of 54 cents, or 117 percent. The Commission might conclude that a 54-cent increase for a mobile customer with a monthly bill of $50.00 is only a 1 percent increase to the customer.[3] However, as an example, a mobile customer in Seattle already pays significant taxes on a $50 service bill. A 54-

[3] VoiceStream's average revenue per mobile customer ("APRU") was $49 during the fourth quarter of 2001. *See* RCR WIRELESS NEWS, "VoiceStream Adds 667K Subscribers in 4Q," at 47 (March 11, 2002).

cent increase in taxes would result in a Seattle customer paying $11.09 monthly in taxes. Thus, more than 22 percent of the amount a Seattle customer pays for mobile service is for taxes (a sum that does not include business and occupation, property and income taxes that are buried in the pricing structure). VoiceStream agrees with the observations of CTIA President Tom Wheeler last week that "something is wrong when good old American competition decreases prices for consumers, which governments then use as a smokescreen to cover increases in hidden taxes":

> When prices go down, consumers' bills should go down, too, without the savings being hijacked by hidden taxes.[4]

The dramatic reductions in mobile service prices – which have fallen by over 32 percent the past four years[5] – offer the opportunity for more Americans to enjoy the benefits of mobile service. A 54-cent tax increase, by itself, may not influence a consumer's decision to purchase mobile service. However, the accretion added to the monthly mobile service tax bill above $11.00 would be enough to dissuade a certain percentage of consumers from purchasing service, and it would persuade a certain percentage of customers to abandon their service. The cumulative effect of these mobile service taxes must be taken into consideration.

A connection-based assessment methodology also is highly regressive. A customer paying $10 monthly for service would pay the same amount as a customer paying $1,000 monthly. This regressive policy change is incompatible with the original policy underpinnings of the USF.

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[4] CTIA Press Release, "Taxes: You're Not Done Paying on April 15, Check Your Wireless Phone Bill (and It Threatens to Get Worse)" (April 15, 2002).

[5] The Consumer Price Index ("CPI") for mobile service was 100 in December 1997. Last month, in March 2002, it had fallen to 67.5. *See* http://data.bls.gov/labjava/outside.jsp?survey=cu.

II. MOBILE CUSTOMERS TODAY PAY A FAIR SHARE OF USF CONTRIBUTIONS UNDER THE CURRENT METHODOLOGY

CMRS carriers (and, therefore, mobile customers) contribute less to USF as a percentage of all funds collected than the two other major industry segments: local exchange carriers ("LECs") and interexchange carriers ("IXCs"). The Commission specifically noted that, during the third quarter of 2001, CMRS providers contributed only 14 percent of all USF monies, while LECs paid 24 percent and IXCs paid 65 percent.[6] The Commission is investigating whether this distribution of the USF burden is inequitable, and whether a more equitable arrangement would be for LECs and CMRS carriers to contribute the identical sum per connection, while IXCs would contribute nothing toward universal service. The Commission is also evaluating whether any such change to the contribution scheme would comply with the Act.

The fact that different industry segments pay different sums in USF contributions, however, does not mean that the current system is discriminatory; it means only that each industry segment has a different level of end-user interstate/international telecommunications revenue.[7] The breakdown of interstate/international end-user telecommunications revenues contained in the most recent Universal Service Monitoring Report (first half of 2000) is as follows:

[6] *See USF Contributions FNPRM* at ¶ 59.

[7] It bears noting that any carrier contributing less to the federal USF program (because it has a smaller percentage of interstate revenues) will simply contribute more towards state USF programs (because it will corresponding have a greater percentage of intrastate revenues).

Interstate/International End-User Telecommunications Revenues[8]
(in millions)

	Amount	Percent
CMRS	$2,852	7%
LECs	$7,265	18%
IXCs	$29,603	74%
Other	$271	0.007%
Total	$39,991	100%

To the extent certain carriers (CMRS and LECs) provide predominately intrastate service and have less interstate traffic than IXCs, the Act mandates that they contribute proportionately less than IXCs to the federal USF. In fact, as discussed below, it is the per connection proposal that would be inequitable and discriminatory, at least so long as each industry segment has different levels of end user interstate telecommunications usage.

It is virtually impossible for mobile services providers to identify all of their revenues as intrastate or interstate with precision, given the inherent nature of mobile wireless service. Accordingly, four years ago the Commission established a "safe harbor" whereby CMRS carriers would report 15 percent of their telecommunications services revenues as being interstate and, necessarily, the remaining 85 percent of their telecommunications services revenues as intrastate.[9] Because CMRS carriers could not accurately segregate their revenues by jurisdiction, the Commission determined that it was "reasonable" to develop a proxy "based on the level of inter-

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[8] *See Universal Service Monitoring Report,* Table 1.1 (Oct. 2001).

[9] *See CMRS Safe Harbor Order,* 13 FCC Rcd 21252 (1998). It is important to remember that in establishing this safe harbor, the Commission eliminated a major competitive inequality in the USF program, whereby some CMRS carriers were reporting as much as 28 percent of their revenues as interstate while others were reporting as little as 7 percent. *See id.* at 21257 ¶ 10.

state traffic experienced by wireline providers."[10] Based on the most current data (1995) then available, an average of 15 percent of all landline minutes of use involved interstate minutes.[11] Accordingly, the Commission decided that CMRS carriers should report 15 percent of their revenues as interstate, stating:

> We find that establishing a safe harbor that assumes that wireless carriers receive interstate and intrastate revenues in similar proportions to wireline carriers represents a conservative estimate, and that such a conservative approach is reasonable as an interim safe harbor.[12]

The Commission notes in the FNPRM that there has been an explosion in customer use of mobile services, with both the number of mobile customers and the number of average minutes of use per customer doubling between 1997 and 2000.[13] What this means is that CMRS revenues – including interstate revenues – have jumped considerably in recent years. These increased revenues recorded as interstate pursuant to the safe harbor mean that CMRS carriers are rapidly paying an increased percentage of total USF contributions. Put another way, CMRS carriers may have contributed 14 percent of all subsidy dollars during the third quarter of 2001; they will undoubtedly pay a higher percentage of subsidy dollars during the third quarter of this year – and will likely pay an even higher percentage next year.[14]

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[10] *Id.* at 21259 ¶ 13. The Commission used for the proxy the interstate percentage of LEC Dial Equipment Minutes of use ("DEM"). DEM is defined as "the minutes of holding time of the originating and terminating local switching equipment." 47 C.F.R. § 36.125(a)(3).

[11] *See CMRS Safe Harbor Order,* 13 FCC Rcd at 21259 n.25, *citing* FCC Monitoring Report, Table 4.5 (May 1997) (including 1995 data).

[12] *Id.* at 21259 ¶ 13.

[13] *See, e.g. USF Contributions FNPRM* at ¶ 11; *Sixth CMRS Competition Report,* 16 FCC Rcd 13350, 13355, 13372 (2001). It is not a coincidence that this explosion in usage occurred during a time when mobile service prices fell by over 30 percent. *See* note 5 *supra*.

[14] VoiceStream asks the Universal Service Administrative Company ("USAC") to identify in its reply comments the sums that the CMRS industry has collectively contributed to the USF program since its inception (by year, if not by quarter). VoiceStream believes these facts will confirm that, with each year, the CMRS industry is paying an increasingly higher percentage of all contributions being made to the USF program.

There is no reason to unravel the decision the Commission made four years ago – namely, that the percentage of interstate calls made over a wireless handset should be no greater than the percentage of interstate calls made over a landline telephone.[15] Accordingly, if the Commission decides to retain interstate revenues as the allocator for USF contributions (and it should, as explained below), it should continue to use LEC state/interstate usage data as a proxy for CMRS state/interstate usage.

Indeed, it may be appropriate for the Commission to reduce the CMRS safe harbor to 13 percent from the current 15 percent. Although customers are using their landline telephone more (daily DEM increased from 38 in 1995 to 50 in 1999), and although the traffic volumes associated with those customers' interstate calls has increased (daily DEM increased from 8 in 1995 to 9 in 1999), the percentage of interstate minutes as a percent of total minutes has dropped from 15 percent in 1995 to 13 percent in 1999 (because local usage has increased even faster).[16] In any event, VoiceStream submits that retention of the safe harbor is greatly preferable to a network connections based system that fails the equity and competitive neutrality tests, as well as court mandates and the Act itself.

In summary, Congress directed that the Commission "must choose a way to measure *the amount* of interstate telecommunications services provided by each carrier, so that the Commission can equitably and nondiscriminatorily assess contributions."[17] The current percentage of revenues assessment methodology achieves this result, while the per-connection proposal does

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[15] According to the most recent Commission data, the vast majority of mobile customers (over 80 percent) pay two charges for making a toll call from their handset: airtime and toll charges. *See Sixth CMRS Competition Report,* 16 FCC Rcd 13350, 13382-83 (2001). VoiceStream suspects that, given the choice, most of these mobile customers would choose to use their landline phone for most toll calls so they would pay only one charge (toll charges). With respect to the less than 20 percent of mobile customers that have subscribed to plans without separate charges for long distance, the customer must weigh the cost of airtime versus the toll charges that would be incurred by using a landline phone.

[16] *See Universal Service Monitoring Report,* Tables 8.3 and 8.4 (Oct. 2001).

not. As CMRS carriers have realized increased revenues from increased usage, they have contributed larger sums to the federal USF program.

III. CHANGING THE ASSESSMENT METHODOLOGY WILL NOT FIX PROBLEMS WITH THE USF PROGRAM

The Commission commenced this proceeding because it fears that marketplace changes "could erode the [USF] contribution base over time":

> If the current [assessment] methodology is not modified or replaced, this trend could erode the contribution base over time, requiring increases in the contribution factor to maintain current levels of universal service support.[18]

VoiceStream respectfully disagrees that the assessment methodology should be the Commission's focus.

The telecommunications marketplace is undergoing fundamental, rapid change. It is true that traditional IXCs are generating less interstate revenue. However, these diminishing IXC revenues are being offset by dramatically increased interstate revenues from CMRS carriers and from the LECs. As the RBOCs obtain Section 271 authority, they appear to be obtaining one-fourth of the interLATA (largely, interstate) business once held by the traditional IXCs.[19] Commission data show that the number of interstate minutes continues to climb:

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17 *USF Contributions NPRM,* 16 FCC Rcd 9892, 9902 ¶ 17 (2001)(emphasis added).

18 *USF Contributions FNPRM* at ¶¶ 1 and 7. *See also id.* at ¶ 132.

19 *See USF Contributions FNPRM* at ¶ 9.

Interstate Switched Access Minutes[20]
(in billions)

Year	Access Minutes
1996	468.1
1997	497.3
1998	518.8
1999	552.7
2000	567.4

The total rate of growth in interstate end-user telecommunications *revenues*, however, is certainly slowing. This development is not due to the fact that American consumers are making fewer interstate calls. As noted above, both landline and mobile customers are making increased use of telecommunications services, and this trend is expected to continue. The slower rate of growth in interstate end user telecommunications revenues is rather due to continued lowering of per-minute prices as a result of intensified competition. According to the Bureau of Labor Statistics, the average price of interstate long distance service fell by 15 percent over the past four years.[21] During the same four-year period, *the average price of mobile service fell by 30 percent*.[22] (In stark contrast, during this period the price for basic fixed telephone service increased by 13 percent.[23])

The fundamental problem with the USF program is not the contribution base or the methodology used to assess contributions on carriers. Interstate end-user telecommunications reve-

[20] *See Universal Service Monitoring Report,* Table 8.2 (Oct. 2001).

[21] The CPI for interstate toll services was 75.3 in March 1998 and 63.9 in March 2002. *See* http://data.bls.gov/lab-java/outside.jsp?survey=cu.

[22] The CPI for mobile service was 97.4 in March 1998 and 67.5 in March 2002. *See id.*

[23] The CPI for basic telephone service was 165.6 in March 1998 and 186.9 in March 2002. *See id.*

nues increased 6 percent in the past three years – from $74 billion in 1998 to $79.4 billion in 2001.[24] During the same period, however, *USF disbursements jumped 52.7 percent* – from $3.6 billion in 1998 to $5.5 billion in 2001.[25] Because USF program disbursements have been growing at a rate faster than the growth in interstate end-user telecommunications revenues, the Commission has had to increase continually the quarterly USF contribution factor – from 5.9 percent during the fourth quarter of 1999 to 7.3 percent during the second quarter of 2002, a 24 percent increase in a little over two years.

The USF program is in need of a fundamental reexamination. For example, for profit business lines do not warrant a subsidy (with consumers effectively subsidizing businesses). Similarly, subsidy dollars should not be available when the USF recipient (generally, an incumbent LEC) charges prices for local service well below the rate paid by most customers.[26]

VoiceStream supports the objective of the 1996 Telecommunications Act to assure that access to advanced telecommunications services is provided to the nation's schools, libraries, and health care facilities, and that consumers in high cost and rural areas, as well as low-income consumers, have access to advanced services. All indications are that, due to the diligent efforts of the Universal Service Administrative Company ("USAC"), in association with the Commission's efforts to assure that the USF contribution factor generates sufficient funds, significant progress has been made to connect the nation's educational and health infrastructure to advanced services and provide consumer access.

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[24] *See Universal Service Monitoring Report,* Table 1.1 (Dec. 1999). Year 2001 data was obtained from the Commission's recent quarterly contributions factor public notices.

[25] Disbursements for the High Cost Program alone jumped from $1.7 billion in 1998 to $2.3 billion during 2000, with disbursements during the first half of 2001 totaling $1.3 billion. *See Universal Service Monitoring Report*, Table 3.7 (Oct. 2001).

[26] The average price for landline local service in 2000 was $20.78 *See Universal Service Monitoring Report*, Table 7.7 (Oct. 2001). Yet, there are hundreds of ILECs that receive large USF subsidies even though they may charge

It has been a half-decade since the inception of the USF. The time has now come to recognize that there is a fundamental, and growing, gap between the nature of the revenue sources available for USF funding and the expense requirements of providing the full panoply of Universal Service offerings. Section 254(b)(7)(1) of the Act notes that Universal Service is an "evolving level" of telecommunication services. VoiceStream respectfully submits that the time has now come for the Commission to reexamine the range and depth of services that become, in effect, the Universal Service entitlement. This gap is the result of an inevitable collision between broadly defined services and narrowly defined (by the statute and the federal courts) sources of revenue. This reexamination can encompass a broad range of data already collected by the Commission on telecommunication service penetration and advanced service offerings.

One point, however, should be clear. Changing the manner in which USF contributions are assessed will ***not*** narrow a funding gap that continues to widen (unless there is a hidden USF contributions increase in the $1 per connection proposal). Regardless of the manner in which USF contributions are assessed – whether as a percentage of revenues or as a fixed sum per network connection – the amounts carriers must contribute (and the amounts customers must ultimately pay) will continue to increase so long as concerted effort is not made to reconcile the Commission's national definition of Universal Service with the funding sources available to pay for it. The economic reality is that, if carriers pay more in USF contributions because the size of the fund continues to grow, wireless customers necessarily will pay higher USF surcharges.

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their customers only $10 or so monthly for local service. Consumers that pay average or above average rates for local service should not have to subsidize ILECs that choose to charge small sums for their local services.

In summary, changing the USF assessment methodology will not, as the Commission suggests, "reduce the total amount that most customers currently pay in contribution recovery fees."[27]

IV. A CONNECTION-BASED ASSESSMENT APPROACH IS INCOMPATIBLE WITH THE REQUIREMENTS OF THE COMMUNICATIONS ACT

The Commission has limited discretion in determining how USF contributions may be assessed on telecommunications carriers because Section 254(d) of the Act imposes two requirements on any plan that the Commission may adopt. First, the statute instructs that contributions shall be assessed on "an equitable and nondiscriminatory basis." The statute further specifies that "every" carrier providing interstate services "shall contribute." Finally, the Commission has interpreted the Act to require that the USF assessment methodology must be competitively neutral. The connection-based assessment approach discussed in the FNPRM does not meet any of these requirements.

A. <u>A Connection-Based Approach Would Not Be Equitable and Non-Discriminatory</u>. Congress specified in Section 254(d) of the Act that carrier USF contributions shall be "equitable and nondiscriminatory."[28] It further directed that all Universal Service programs, state and federal, comply with the principle that "[a]ll providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service."[29]

The Commission suggests that a contribution-based assessment approach would be equitable and nondiscriminatory because "[c]ontributors competing in the same market segments would be subject to equivalent contribution requirements":

[27] *USF Contributions NPRM* at ¶ 72. *See also id.* at ¶ 17.

[28] 47 U.S.C. § 254(d).

A wireless connection and a wireline connection, for example, would be subject to the same assessment.[30]

A per connection approach may treat providers of local telecommunications services alike (*e.g.,* LECs and CMRS carriers each pay $1 monthly per connection), but CMRS carriers have been participating in a different market segment – namely, they provide toll services in competition with IXCs. A per connection approach would not, however, treat CMRS carriers and IXCs equitably:

	Federal USF Contributions (Per Connection)	State USF Contributions (Percentage of Revenues Assessed)
IXCs	0	27% of Revenues[31]
CMRS	$1.00	85% of Revenues

Federal courts have held that a USF contribution approach is discriminatory and in contravention of Section 254 of the Act if the methodology "damages some . . . carriers . . . more than it harms others."[32] Clearly, a connection-based assessment methodology would harm some carriers more than others; in fact, such an approach would be a windfall for IXCs since they would be excused from making any USF contributions – even though they generate almost three times more end-user interstate/international telecommunications revenues (74 percent of the total[33]) than the two other industry segments combined. The observation in the FNPRM – a connection-based approach "would represent a significant shifting of contribution obligations away

[29] *Id.* at § 254(b)(4).

[30] *USF Contributions NPRM* at ¶ 67.

[31] According to the most current data available, in 1999 and again during the first half of 2000, 27 percent of IXC end-user revenues were intrastate while 73 percent of their end user revenues were interstate. *See Monitoring Report,* Table 1.1 (Oct. 2001).

[32] *Texas Office of Public Utility Counsel* v. *FCC,* 183 F.3d 393, 435 (5th Cir. 1999).

[33] *See* page 5 *supra.*

from interexchange carriers to local exchange carriers and mobile service providers"[34] – is a huge understatement.

The Commission has recognized that, under its statutory mandate, it "must choose a way to measure *the amount* of interstate telecommunications services provided by each carrier, so that the Commission can equitably and nondiscriminatorily assess contributions."[35] A fundamental legal defect of a connection-based approach is that it does not measure "the amount of interstate telecommunications services provided by each carrier." A carrier providing no interstate services over a network connection would be required to collect and pay a federal interstate USF per connection fee, while another carrier that provides exclusively interstate services would contribute nothing to the federal interstate fund. Under no circumstances can such an arrangement be deemed "equitable and nondiscriminatory," as Section 254 commands.

B. <u>A Connection-Based Approach Would Not Include Every Carrier</u>. Section 254(d) of the Act commands that "*[e]very* telecommunications carrier that provides interstate telecommunications services *shall* contribute" to USF.[36] The current revenue-based assessment approach satisfies this requirement; a connection-based approach does not. With the proposed connection-based approach, only those carriers providing local intrastate service (*i.e.*, connections) would make contributions. Providers of interstate services that do not also provide local service (*e.g.,* IXCs) would contribute *nothing* towards the federal interstate USF program.[37]

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[34] *USF Contributions FNPRM* at ¶ 59.

[35] *USF Contributions NPRM,* 16 FCC Rcd at 9902 ¶ 17 (emphasis added).

[36] 47 U.S.C. § 254(d)(emphasis added).

[37] *See, e.g.,USF Contributions NPRM* at ¶ 68 ("We acknowledge, for example, that there are certain non-connection-based interstate telecommunications service providers, such as exclusive providers of pre-paid calling cards or dial-around service providers, that would not contribute under the proposed methodology.").

The Commission notes that some IXCs have a CLEC affiliate and that CLEC affiliates would contribute based on the number of connections they provide.[38] However, most IXCs provide no local services and, thus, most IXCs would be exempt from any USF contributions under the connection-based proposal. The contributions from IXCs' CLEC affiliates would be, at best, modest. An exemption covering so many carriers with huge interstate revenues would be incompatible with the statutory requirement that "every" carrier "shall contribute." To the extent that a CLEC affiliate provides retail interstate service to its customers, its parent IXC should be relieved from the statutory duty to contribute. But wholesale relief extended to all IXCs would violate the Act's mandate that every carrier contribute to the USF. Indeed, the Commission has previously recognized that it does not possess the authority to exempt providers of interstate services from their obligation to contribute to Universal Service:

> The plain language of section 254(d), however, affords the Commission no discretionary authority to exempt any telecommunications carriers that provide interstate telecommunications services.[39]

The Commission does possess *de minimis* exemption authority, and it asks whether it could exempt IXCs under this exemption.[40] Congress was very clear, however, that this *de minimis* exemption authority is limited to situations where a carrier's "level" of contributions would be *de minimis.*[41] Congress explicitly instructed that this *de minimis* authority may "only

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[38] *See USF Contributions FNPRM* at ¶ 66.

[39] *Universal Service Report to Congress,* 13 FCC Rcd 11501, 11562-63 ¶ 129 (1998). *See also id.* ("To the extent they are telecommunications carriers that provide interstate telecommunications services, resellers are mandatory contributors under section 254(d)."); *id.* at 11570 ¶ 140 (The *de minimis* clause "provides the only statutory authority for exempting a carrier or class of carriers that would otherwise be required to contribute to universal service mechanisms."); *Universal Services Order,* 12 FCC Rcd at 9188 ¶ 804 ("We agree with the Joint Board that the *de minimis* exemption is the only basis upon which to except contributors.").

[40] *See USF Contributions FNPRM* at ¶ 66.

[41] *See* 47 U.S.C. § 254(d)("The Commission may exempt a carrier or class of carriers from this requirement if the carrier's telecommunications activities are limited to such an extent that the level of such carrier's contribution to the preservation and advancement of universal service would be de minimis.").

be used in cases where the administrative cost of collecting contributions from carriers would exceed the contribution that the carrier would otherwise have to make,"[42] and the Commission has held that this exemption authority shall be "narrowly construed."[43]

> The statute and legislative history support the conclusion that the *de minimis* exemption may not be used to exempt any other class of contributor.[44]

The connection-based proposal discussed in the FNPRM would exempt IXCs not because their level of contributions would be less than the administrative collection costs, but because they do not provide local intrastate services. Clearly, the Commission cannot invoke its *de minimis* authority to exempt dozens (if not hundreds) of carriers from an *interstate* USF program simply because they do not provide *local intrastate* services. IXCs may disagree with the policy decision made by Congress, but the Commission does not have the authority to adopt an approach other than the one the Congress has chosen.

3. <u>The Commission Has Already Ruled That a Connection-Based Approach Would Not be Competitively Neutral</u>. The Commission has determined that its Universal Service policies must be competitively neutral.[45] Basing USF contributions on interstate revenues derived from end users is competitively neutral.[46] In contrast, a connection-based assessment approach would contravene the principle of competitive neutrality, a point the Commission has already recognized:

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[42] S. CONF. REP. NO. 104-230, 104th Cong., 2d Sess. 131 (1996).

[43] *See Universal Service Order,* 12 FCC Rcd at 9187 ¶ 802. *See also Report to Congress,* 13 FCC Rcd at 11563 ¶ 129.

[44] *Report to Congress,* 13 FCC Rcd at 11571 ¶ 142.

[45] *See First Universal Service Order,* 12 FCC Rcd 8776, 8801-02 ¶¶ 46-49 (1997).

[46] *See id.* at 9206-07 ¶ 844 ("We will assess contributions based on telecommunications revenues derived from end users for several reasons, including administrative ease and competitive neutrality. . . . This methodology is both competitively neutral and relatively easy to administer.").

> We do not adopt commenters' suggestions that contributions be calculated entirely on non-revenues-based measures, such as a per-minute or per-line basis . . . . [W]e find that these approaches are not competitively neutral because they may inadvertently favor certain services or providers over others if the "equivalency ratios" are improperly calculated or inaccurate.[47]

The changes in the marketplace that the FNPRM recites have no relevance to the reasons the Commission held in 1997 that a per-connection approach would not be competitively neutral. Thus, if a connection-based methodology was not competitively neutral in 1997, it cannot be competitively neutral today.

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Federal courts struck down the Commission's original Universal Service plan because the Commission improperly included intrastate revenues in its contribution assessment methodology.[48] Treating all network connections the same regardless of how much each connection is used to carry interstate traffic would, as the Commission freely acknowledges, "significantly shift" contribution obligations from providers of predominantly interstate service (IXCs) to providers of predominately intrastate services (CMRS and LECs).[49] With a connection-based approach, USF contributions would be measured solely on the number of *intrastate* connections that a customer purchases, and *not* on the amount or level of *interstate* services provided over those connections. For all intents and purposes, a connection-based approach would recreate the very assessment methodology that courts have already held to be flatly inconsistent with the requirements of Section 254 of the Act.

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[47] *Id.* at 9210 ¶ 852.

[48] *See Texas Office of Public Utility Counsel* v. *FCC,* 183 F.3d 393 (5th Cir. 1999).

[49] *USF Contributions FNPRM* at ¶ 59.

V. A CONNECTION-BASED ASSESSMENT APPROACH IS NOT ADMINISTRATIVELY SIMPLE

Only five years ago, the Commission adopted a percentage of revenues methodology in part because such an approach is "relatively easy to administer," while it rejected a per connection approach in part because it would be "administratively difficult."[50] The Commission now proposing to change its position, apparently believing today that a connection-based approach would "streamline and improve the current system,"[51] "reduce administrative costs,"[52] and "simplify the current assessment system and reduce overall administrative burdens."[53] While this proposal may have some initial cosmetic appeal, operationally it would introduce huge complexities and costs for the CMRS carriers and the LECs.

To be sure, IXCs would realize savings from a connection-based approach (since they would be relieved from USF contributions altogether), but the FNPRM does not document any administrative savings to other USF contributors, including CMRS carriers. Indeed, the FNPRM recognizes that a per-connection approach would require contributors to prepare and submit 13 reports a year (vs. the 5 today).[54]

VoiceStream finds noteworthy that the Commission's designated expert, the USAC, does not share the Commission's new view. The USAC has already advised the Commission that the use of a connection-based approach would create "significant administrative hurdles":

> Among other things, the Commission would be required to establish clear rules regarding which types of companies are subject to the contribution requirement

[50] *First Universal Service Order,* 12 FCC Rcd 8776, 9207 ¶ 844, 9210 ¶ 852 (1997).

[51] *USF Contributions FNPRM* at ¶ 3.

[52] *Id.* at ¶ 17.

[53] *Id.* at ¶ 63.

[54] *See USF Contributions FNPRM* at ¶¶ 77-78.

> and which carriers are responsible for certain customers or classes of customers. These issues could quickly become very complex.[55]

USAC further noted that it would be "required to develop completely new billing and collection systems, and would also need to implement new audit systems, all of which would require significant one-time investments."[56] The USAC would "still be required to bill and collect from carriers on a monthly basis, making any reduction in administrative costs unlikely."[57] A connection-based approach would also create "difficulties in USAC and FCC verification of carrier line count data."[58] The USAC's conclusion regarding a connection-based approach:

> Administrative costs and complexity, as well as carrier gaming opportunities resulting from differing customer and service classifications, would increase accordingly."[59]

USAC's concerns are illustrated by a very significant example: prepaid service. VoiceStream's prepaid service can be obtained today for $99.99, a sum that includes a state-of-the-art handset (*e.g.*, Nokia 3390) and thirty minutes of airtime that should be used within ninety days. VoiceStream prepaid customers can purchase cards to obtain additional minutes: $10 cards (for 25 additional minutes), $25 cards (100 minutes), $50 cards (250 minutes), or $100 cards (500 minutes). The additional minutes must be used within a ninety-day period. Would VoiceStream be required to add the same standard "connection USF" fee to each card, such that a $10 card would actually become an $11 card, and a $100 card would actually become a $101 card? Prepaid customers purchase airtime minutes to be used within a specified period of time. One customer might use his one hundred prepaid minutes over the course of three months, while

[55] USAC Comments, Docket No. 96-45, at 16 (June 25, 2001).

[56] USAC Reply Comments, Docket No. 96-45, at 14-15 (July 9, 2001).

[57] USAC Comments at 17.

[58] USAC Reply Comments at 14.

[59] *Id.*

another person may use her one hundred prepaid minutes in less than a week. Should a card that can be used over three months be assessed three "connection fees"? What if a person purchases five cards in one month? Would this person be required to pay five "connection fees"? How is VoiceStream to ascertain at the time of purchase how quickly a customer will use his or her prepaid card?

The prepaid example is by no means unique.[60] The point is that telecommunications carriers offer dozens of unique services, and the conversion to a connection-based assessment methodology will open a Pandora's box whereby the Commission will be required to provide clarification for each of these services.

As discussed immediately below, conversion to a contribution-based assessment methodology for federal USF program purposes will require carriers to design and manage new systems to accommodate the radically different connection-based approach, while maintaining the existing percentage-of-revenues-based approach for state USF and sales tax purposes.

VI. THE COMMISSION WOULD STILL BE REQUIRED TO ADOPT A CMRS "SAFE HARBOR" EVEN IF IT ADOPTS A CONNECTION-BASED APPROACH

The Commission suggests that a connection-based assessment approach would "not require carriers to distinguish between interstate and intrastate revenues."[61] VoiceStream must respectfully disagree. Not only would carriers still be required to report revenues on a state/inter-

[60] As another example, some DSL providers use Symmetrical Digital Subscriber Line ("SDSL") technology. SDSL requires use of a separate loop, so presumably SDSL customers would pay a separate USF connection fee. In contrast, other DSL providers use Asymmetrical Digital Subscriber Line ("ADSL") technology, where voice and DSL services are provided over the same loop. Since ADSL uses the same connection (loop) as voice service, it would appear that ADSL providers would not pay a separate USF connection fee for the connection, giving ADSL providers an artificial cost advantage over SDSL providers, even though the service is the same. The FCC suggests without discussion that ADSL service "might" be assessed a connection fee because it provides "independent" access to the public network. *See USF Contributions FNPRM* at ¶ 42. But if the sharing of one network connection between a LEC and ADSL providers is deemed to be two connections, why is the sharing of one network connection between a LEC and IXC not deemed to be two connections? In each instance, the IXC and DSL providers effectively lease capacity in the loop to provide their respective services.

state basis, but also the Commission would still be required to establish a safe harbor interstate percentage allocator for CMRS carriers.

For federal reporting purposes, carriers would still be required to distinguish between state and interstate revenues for purposes of the Telecommunications Relay Services (TRS), which like the interstate USF, is also based on interstate end-user telecommunications revenues.[62] More fundamentally, however, even if the Commission folds TRS contributions into the interstate USF per connection fee, carriers would still be required to distinguish intrastate from interstate revenues for state fee and sales tax programs, which remain largely based on intrastate revenues. Thus, adoption of a per connection approach for federal fees would subject carriers to the worst of both worlds – namely, they would still be required to report state/interstate revenues *and* they would also have to use an entirely different approach for the federal USF program.

The Commission has recognized that CMRS carriers cannot reasonably identify all of their revenues as intrastate or interstate, given the inherent nature of mobile service.[63] Requiring carriers to attempt to undertake one state/interstate usage study would be a mammoth undertaking for any carrier. Forcing carriers to undertake fifty plus separate state/interstate usage studies would be practically impossible.

Congress has directed that the Commission "establish a Federal regulatory framework to govern the offering of all commercial mobile services" in order to "foster the growth and development of mobile services that by their nature operate without regard to state lines."[64] VoiceStream submits that the Commission would be obligated to establish a CMRS state/interstate

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[61] *USF Contributions FNPRM* at ¶ 71.

[62] *See* 64 C.F.R. § 64.604(c)(iii)(A). In contrast, fees for the North American Numbering Plan and Local Number Portability are based on intrastate *and* interstate revenues.

[63] *See CMRS Safe Harbor Order,* 13 FCC Rcd 21252 (1998).

state/interstate allocator safe harbor even if it adopts a connection-based approach for federal USF funding.

VII. CONCLUSION

The current assessment approach may not be perfect. But courts have confirmed that the methodology is lawful and consistent with the requirements of Section 254 of the Communications Act. USAC and carriers have also built systems based on this approach, and it is becoming workable over time.

Conversion to a fundamentally different assessment methodology based on network connections will entail enormous expense for all carriers (except IXCs), and will open an endless set of new controversies as carriers and the Commission attempt to define the exact parameters of the new approach – while carriers would still need to rely on the existing revenues-based approach for state USF and sales tax programs. Carriers inevitably will encounter operational problems that will take significant time and money to sort through. More fundamentally, the adoption of a connection-based approach may likely be challenged in court, placing a new legal cloud over the entire USF program. The challenge the Commission and industry faced when the courts struck down the Commission's inclusion of intrastate revenues will be miniscule compared to the challenge the Commission and industry would face if the courts strike down a connection-based approach after its implementation.

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[64] H.R. REP. NO. 103-213. 103d Cong., 1st Sess. 490 (1993); H.R.. REP. NO. 103-111, 103d Cong., 1st Sess. 260-61

For the foregoing reasons, VoiceStream respectfully requests that the Commission reject a connection-based assessment approach and commence a new proceeding to consider meaningful USF reform. Consumers will continue to pay more – regardless of the assessment methodology utilized – so long as the USF disbursement mechanism is not comprehensively reexamined.

Respectfully submitted,

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